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Supreme Court
of the
United States

October Term, 19__

No. 1288

MICHAEL J. McLANEY, a/k/a
MIKE McLANEY,

Petitioner,

vs.

TIME, INC., d/b/a "LIFE",

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

		Page
A	OPINIONS BELOW	1
B	GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED	2
C	QUESTION PRESENTED FOR REVIEW	5
D	CONSTITUTIONAL PROVISION INVOLVED	5
E	STATEMENT OF THE CASE	5
F	REASONS FOR ALLOWING WRIT	14
	CONCLUSION	19
	CERTIFICATE OF SERVICE	20
	APPENDIX	App. 1

TABLE OF CASES

	Page
Curtis Publishing Company v. Butts, 388 U.S. 130, 87 S.Ct. 1975	3, 4, 13, 14, 15, 16, 17, 18
New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710	3, 4, 13, 14, 15, 16, 18
Rosenblatt v. Baer, 383 U.S. 75, 86 (footnote 13); 86 S.Ct. 669, 676 (footnote 13)	18
United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., et al. (9th Circuit No. 21,466 D.C.)	12

AUTHORITIES CITED

28 U.S.C. §1254(1)	2
28 U.S.C. §2101(c)	2
28 U.S.C. §1292(b)	2

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A. OPINIONS BELOW

The petitioner herein, Michael J. McLaney, seeks to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, in case of *Time, Inc., d/b/a "Life" v. Michael J. McLaney, a/k/a Mike McLaney*, case no. 25585, which reversed an order of the United States District Court for the Southern District of Florida.

NOTE: All Emphasis Supplied
R: Record of Proceedings Below, Duly Certified

Copies of the judgment and opinion of the Court of Appeals, and the order from which the appeal was taken are annexed hereto as Appendix "A" and Appendix "B". Copies of the judgment and order denying rehearing are annexed as Appendices C and D.

B. GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was dated January 3, 1969. A timely petition for rehearing was filed (R. 500) and was denied in a "per curiam" order dated February 11, 1969 (R. 509). Jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1); 28 U.S.C. §2101 (c). The petitioner seeks review, by way of certiorari, of the decision of the Court of Appeals, which held that the petitioner, the plaintiff in the trial court in this libel suit, was barred from recovery as a matter of law, because he had thrust "his personality into the 'vortex' of an important public controversy"; and as a matter of law no malice existed in the publication of the article involved.

Accordingly, on an appeal from an interlocutory order, on the required certificate pursuant to 28 U.S.C. §1292 (b), (R. 471-472), the Fifth Circuit *reversed* the order denying the motion for summary judgment of Time, Inc., the defendant in the trial court, and directed entry of summary final judgment.

In so ruling, the Fifth Circuit held that this suit for libel by the petitioner was precluded by the First Amendment of the Constitution of the United States, incorporated in Amendment XIV insofar as states are concerned, and

its guaranty of "freedom of the press", and by the interpretive holdings of, *inter alia*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710; and *Curtis Publishing Co. v. Butts*, 338 U.S. 130, 87 S.Ct. 1975.

The petitioner urges simply that the so-called "public figure" doctrine was not and is not applicable here—and certainly was not applicable so as to justify a summary final judgment; that on this record it was unnecessary for the petitioner to demonstrate "actual malice" or recklessness which would be the equivalent thereof; that Mr. McLaney was not a "public figure" either by status pre-existing the allegedly libelous article as was Coach Butts in the *Butts* case, supra; or by continually speaking out over a sustained period of time on a great issue of the day so as to establish a pre-existing pre-eminence, as did General Walker; and thus was not subject to the *Sullivan* case doctrine—applied to "public-figures" in libel suits under the *Butts* case, supra.

The petitioner contends further that Mr. McLaney did not inject himself into a great issue of the day by financially supporting a political candidate in the Bahamas.

In the context of the article complained of here, mere political contributions by the plaintiff to the Pindling party would not even have been mentioned unless McLaney were connected with the "mob" in some fashion or manner. The sentence "The mob always tries to hedge its bets" was added with reference to the plaintiff merely to place the reference to McLaney in "context" (R. 286). Prior drafts of the article contained no such language. Thus the Court below apparently overlooked that individual activity in any sphere of potential public concern (political contributions

in a foreign campaign) does not permit a publisher to libel the individual as to other aspects of his personal life (tying him in with the mob so as to fit his activity into context of the article) and then to claim the *Sullivan* privilege. For example, even in cases of public officials, the privilege extends only to criticism of their official conduct.

For the purposes of this appeal, of course, truth or falsity of the article is not at issue and it must be assumed that the "mobster" label is false; accordingly, it is respectfully urged that the libel here alone justified mention of McLaney in the context of the article complained of, and without the libel, his political contributions would not justify personal and libelous statements as to his character or give rise to the *Butts, Walker* privilege.

It is respectfully urged that the Court here is permitting the publisher itself to create a "public" issue and to publish a libel which in effect contributes to the creation of the article's "public" issue itself, and that this should not be permitted.

The petitioner herein respectfully avers that the holding here is of such a nature as to further and unduly enlarge and extend the limits of a constitutional privilege.

In other words, even if the "Vortex" theory pronounced by the Fifth Circuit were a correct and applicable pronouncement of constitutional law, still, the "great public interest or importance" involved in the article could not be created by the libel itself.

Thus the decision here far surpasses anything pronounced by this Court in *Sullivan*, or *Butts*, or its kindred cases.

C. QUESTION PRESENTED FOR REVIEW

The primary question presented is:

MAY A PUBLISHER CREATE A MATTER OF PUBLIC IMPORTANCE BY LIBEL OF A NON-PUBLIC-FIGURE AND THEN CLAIM A FIRST AMENDMENT PRIVILEGE IN DEFENSE?

D. CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

E. STATEMENT OF THE CASE

In their weekly edition of "Life", dated February 3, 1967, Volume 62, No. 5, the defendant, Time, Inc., published and widely circulated, an article entitled: "The Scandal in the Bahamas" with subhead, "An exposure of an island paradise corrupted by graft, greed and an influx of U.S. gangsters." The article was written by Richard Oulahan and William Lambert of the Time, Inc., staff (R. 13-28). Contained in the article was the following paragraph which underlies this libel suit instituted by the plaintiff, Michael J. McLaney, of Miami Beach, in the Florida State Court on March 23, 1967 (R. 7-11):

> "Whatever the Pindling government decides to do about these three gamblers, one of their colleagues has turned up in the midst of Pindling's party. He is Mike McLaney, who managed one of Havana's big casinos in the days when Lansky was the top mobster in the Cuban capital. During the recent election campaign, McLaney showed up in the Out Islands, providing free airlifts for P.L.P. candidates. The mob always tries to hedge its bets." (R. 22).

Immediately preceding this reference to the plaintiff, the defendant referred to "the three gamblers" subsequently designated as "colleagues" of Mr. McLaney, as follows:

> "Courtney, Ritter and Brudner are all fugitives from U.S. justice, under indictment for violating the federal anti-racketeering statute as well as gambling-tax evasion and failure to buy the annual $50 gambling stamp. (They once operated the nation's largest bookie network, inherited from the late Frank Erickson)." (R. 21).

These three gamblers, in the article, were described as "three [Meyer] Lansky henchmen" (R. 27).

Manifestly, the paragraph stated, in context, that the plaintiff was a member of the "mob" or Lansky syndicate and was a mobster; and that he was a colleague of fugitives from justice and of persons under indictment, "Lansky henchmen", racketeers, and gambling tax evaders. The action against Time, Inc., accordingly, alleged falsity, malice, and libel per se (R. 7-11; Ex. A., (article), R. 12-28).

The magazine and article were widely circulated throughout the United States, Florida and Dade County, and foreign countries (R. 7, 98). As a result of the article, the plaintiff, who alleged that he and his wife and children were residents of Dade County, Florida, and that he was a respected businessman, church-goer, and member of social organizations, sought general compensatory damages in the amount of $1,000,000.00 and punitive damages in the amount of $5,000,000.00 (R. 10-11). A demand for retraction, mailed to the defendant on behalf of the plaintiff, pursuant to Florida Statutes § 770.01-02, had been ignored (R. 10; Ex. B. to complaint, and R. 98).

Time, Inc., a New York corporation, removed the cause to the United States District Court in and for the Southern District of Florida, on April 14, 1967, on diversity grounds (See R. 3). Thereafter, in its answer, the defendant admitted its status; publication and circulation of the article; and receipt of the demand for retraction. It then pleaded truth and fair comment; that the article was privileged, as published without malice, since it dealt with matters of public interest, and was reasonably believed to be true; that the plaintiff had thrust himself into public attention and rendered himself a public figure and his activities a matter of public interest; that the article dealt with public figures whose activities were a matter of public interest, reported in good faith; that maintenance of this action would violate its rights under the First and Fourteenth Amendments (freedom of speech, press, and due process); and that the article was published in good faith, without malice; and in reliance on reasonable sources (R. 98-100).

Subsequently, discovery proceedings were had (all at the institution of the plaintiff). So-called "sources" for the disputed paragraph were identified and explored, depositions taken, and source material and drafts produced. The defendant ultimately moved for summary judgment on the ground that "there is no genuine issue of material fact, but that the Plaintiff is a public figure and has thrust himself into the 'vortex' of an important public controversy and further that there is no genuine issue of material facts but that the Defendant did not publish the alleged defamatory reference to the Plaintiff with knowledge or reckless disregard of falsity of its contents." (R. 129).

By order, dated October 31, 1967, filed November 1, 1967, the motion flatly was denied (Choate, Senior U. S. District Judge), upon a finding that

> ". . . it does not appear that the plaintiff is a public figure and involved in an issue in which the public has a justified and important interest" (R. 471).

In entering the order, the District Court further ruled, however, that:

> "The Court being of the opinion that this Order involves controlling questions of law as to which there is substantial ground for difference of opinion namely:
>
> "(1) Is the Plaintiff a public figure involved in an issue in which the public has a justified and important interest so as to place upon the

Plaintiff the burden of showing reckless disregard of the truth or falsity of the complained-of-reference, or the burden of showing highly unreasonable conduct in reference to the truth of the statement that Plaintiff was closely associated with mob activities; and

"(2) If the foregoing question is answered in the affirmative, is there an issue of fact to submit to a jury with respect to the Defendant's reckless disregard of the truth or falsity of its publication, or as to whether the conduct of the Defendant was highly unreasonable, constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

"And the Court being of the further opinion that an immediate appeal from this Order may materially advance the ultimate termination of the litigation, it is

"Further Ordered, pursuant to 28 U.S.C. 1292(b), that all proceedings herein are stayed for a period of not less than ten days from the date of this Order to allow Defendant time to apply for permission to appeal from this Order, such stay to continue in effect until final disposition of such application and any appeal which may result therefrom." (R. 471-472).[1]

[1]At the time the order was entered, the plaintiff already had moved for partial summary judgment to the effect, inter alia, that the publication was libelous per se and was false; that he was not a public figure and that the Florida statutory demand for retraction was made (R. 353-354). The motion was made with ample reason, insofar as falsity is concerned (R. 354-356; affidavit of McLaney). Obviously, the issue of falsity was not involved.

This Court granted leave to appeal from the interlocutory order, pursuant to 28 U.S.C. 1292 (b), on December 7, 1967 (R. 474) and the appeal followed (R. 473, 475).

On Appeal, the First Circuit reversed, and directed entry of summary final judgment, apparently answering question (1) in the affirmative and question (2) in the negative.

The basic facts underlying these proceedings are contained in the opinion of the Fifth Circuit. Briefly summarized the record reveals that the defendant, Time, Inc.—prior to printing and publishing the article in question —investigated the subject matter and ascertained, from newspaper articles covering the relevant period, that during the period of time toward the end of the 1950's, immediately preceding the Castro revolution in Cuba, Meyer Lansky—a well-known underworld czar in the United States, and the then Cuban dictator, Fulgencio Batista, reputedly controlled gambling as a partnership in Cuba, and that no person could operate a casino in Havana without approval of Lansky (R. 69, 263; 72, 264-265; R. 77, 267-268; R. 78; R. 86; 270-271).

It was then ascertained from prior clippings that Mr. McLaney had operated the gambling casino in the Hotel Nacional in Havana at the end of the decade, (R. 87-88; 272-273).

Thereafter, during the Pindling reform campaign in late 1966, McLaney, as his own affidavit averred, supported the Pindling Movement, by leasing a helicopter, three planes and a boat, and paid for the rental charges, and paid for some campaign literature. McLaney *was not* a member of a "mob" or gang; never had met Lansky; and was not a "colleague" of Ritter, Brudner, and Courtney, the Notorious American gamblers (R. 354-356).

The defendant's reporter, while looking into the matter, became aware that McLaney had operated the Nacional; that Lansky reputedly was gambling czar in Cuba; and that McLaney was now supporting Pindling who was running against the established government in the Bahamas. From these premises, the mention of McLaney came about. Step by step, McLaney was equated with the "mob". Indeed, the sentence that, "The mob always tries to hedge its bets", was added in the final stages, because the articles editor of Life believed that without such a statement, McLaney had no place in the article and reference to his activity was "collateral" and out of context (Ex. 24; 25; R. 95, 282, 286). And the reference to McLaney as "One of their colleagues" [i. e., a colleague of Brudner, Ritter and Courtney], was added to make the Article "smoother". (R. 278, 95).

There, of course, were many, many more facets to the factual setting and investigation carefully discussed in the opinion of the Fifth Circuit, but for purposes of summary judgment proceedings, obviously the *falsity* of the references to McLaney must be accepted,[2] and the above summary constitutes the basic fact pattern upon which the Fifth Circuit ruled.

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[2]Lambert could not recall when McLaney was in Cuba; or for how long. Indeed, Lansky was expelled from Cuba for some time by Batista (R. 75-79) and there is absolutely no showing he had anything at all to say about McLaney's purchase of the casino, and his operation of it in 1958—the year of the Lansky expulsion. (See 75-79, 286-288, 393, 365, 436, 380-382); and indeed, when McLaney bought into the Nacional, from Sam Tucker and Wilbur Clark, Lansky's brother—who had been a former pit boss—was removed. "Jake" Lansky never was associated with McLaney in business (R. 380-381). The hotel was owned by Pan-Am (R. 436).

In its opinion (Appendix "A"), the Fifth Circuit held:

> "The cases already cited make clear that the thrust at state libel laws is proper in other varying situations in which matters of great public interest are involved. In Walker and Butts, *supra*, the standard of New York Times was applied to "public figures", and in Hill, *supra*, to suits for invasion of privacy based on false statements where a "matter of public interest is involved." Furthermore, we agree with the Court of Appeals for the Ninth Circuit which in its recent case, *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., et al* (9th Cir., No. 21,466) D.C. November 18, 1968, said: "The standard of New York Times was not to be regarded as having had 'its outer limits . . . marked out' so as not to be open to further definition.
>
> We conclude that the constitutional privilege extends to discussions by specific individuals, not associated with any government, if those individuals are involved in matters of important public concern. Such was the case of the plaintiff here. He had injected himself into an election campaign in a small foreign country in which the announced policy of the opposition to the present government was the elimination of racketeer gambling. He had supported the effort of this reform government by contributing substantial material aid,[8]

[8]Varying values are stated by different persons as to the cost of the helicopter rentals incurred by McLaney. The amounts varied from $25,000 to $100,000. The figure of approximately $60,000 seems well established.

and thus lent a direct influence to the election of a national government for the country. Such activities as he engaged in, and his conduct as such a participant, are the proper subject of inquiry and of public interest. It seems clear, that he, as much as General Walker in the Walker case, supra, acted in a manner that amounted to a "thrusting of his personality into the 'vortex' of an important public controversy."

We conclude, therefore, that the defendant was entitled to a summary judgment because, following a motion for such judgment, and after proof was taken to show, if possible, the existence of malice, the record is silent as to any facts which would permit a fact finder to conclude that the standard laid down by the Supreme Court had been met by the plaintiff.

The judgment denying motion for summary judgment is REVERSED and the case is REMANDED to the district court with directions that a summary judgment for the defendant be entered. (19-20 of opinion).

The petitioner, here claims simply that he is not and never was a "mobster" (R. 354-356), and that the decision here is in direct conflict with *Butts*, supra; and *Sullivan*, supra; and stretches the doctrine of those cases beyond the outer limits of freedom of the press, and indeed, goes far toward obliterating any protection for individual reputation.

F. REASONS FOR ALLOWING WRIT

As the opinion below indicates, the holding goes further than this Court ever has in interpreting the First Amendment guaranty of freedom of the press. In substance, and when the opinion and facts are properly analyzed the holding of the case actually would permit a magazine falsely to connect an individual with a notorious, ill-famed group or event; then claim that such group or event is news worthy and of great public importance; and then to hide behind the First Amendment when judgment day comes in the form of a defamation suit. In reality, this is what was done here.

Nothing in *Butts*, supra; *Sullivan*, supra, or any of its kindred affords such protection to the press, even if the "vortex" theory, as pronounced herein by the Fifth Circuit, in a libel case, were legally sound and proper when a private individual *actually does* become involved cursorily in a newsworthy event or subject matter—which itself is questionable. But certainly the involvement cannot be established by the libel itself.

Accordingly, the decision below is not in conformity with what this Court would hold in such a case, and in fact conflicts with *Butts*, supra. This Court then, it is respectfully submitted, should grant the petition, and answer the question presented in the negative.

The Court below seems to hold that the NEW YORK TIMES v. SULLIVAN and CURTIS PUBLISHING CO. v. BUTTS doctrine applies, imposing the rigorous "actual malice" burden on the plaintiff, even though he were not a "public figure" prior to the defamatory article or subject-matter thereof. It apparently holds that the respondent derives the protection of the "actual malice" doctrine (i.e.,

actual knowledge of falsity or reckless disregard of truth or falsity) because McLaney, even if not a public figure before, thrust himself into the "vortex" of a matter of legitimate and important public interest, or became involved therein, and that therefore, *Life* was entitled to the benefit and protection of TIMES and BUTTS—*whether or not* McLaney was a "public figure" by virtue of his pre-existing status.

As we shall see, this argument is fallacious for several reasons:

(a) McLaney was no "public figure" within the meaning of SULLIVAN and BUTTS—as the trial court properly held. Contrary to the holding below, the doctrine of BUTTS (dealing with "public figures" as contrasted with "public officials") is applicable where an existing "public figure" becomes involved in an issue of legitimate public importance and concern, or a person over a long period involves himself in an important issue, in which the public has a legitimate interest, and thus becomes a "public figure."

McLaney was no public figure prior to the defamation here—that is for certain.

(b) McLaney did not mysteriously become a public figure simply because Time, Inc., chose to call him a "mobster." *Admittedly, McLaney was of no importance to the story or article, and mention of his name was not even in context, unless he were connected with the "mob" or said to be some sort of colleague of the three syndicate bookmakers.* Accordingly, in no event was he involved in a public issue or controversy with which the defamatory paragraph dealt *because the libel itself was the only thing which actually connected him with the only real matter of public importance.* (i.e. movement of the Havana gambling "mob" to the Bahamas).

And he certainly did not, as did General Walker (see, CURTIS PUBLISHING CO. v. BUTTS) command *continuing public interest* through purposeful injection of his personality—through media, etc.—into the vortex of an important public issue. It is doubtful, at best, if the article dealing with the Bahamas in itself was of great public importance in this country. But calling McLaney a "mobster" was totally or unwarranted in any event.

(c) Even if TIMES and BUTTS apply (although a personality is not a pre-existing "public figure"), when a personality is involved in a matter of public importance, McLaney still did not qualify; the libel itself cannot create the public importance and his prior status alone certainly did not render him a public figure or one who commanded an independent public interest before (cf., Coach Wallace Butts). Nor did this *defamation* deal with any matter even suggested by the press before in its sporadic coverage of McLaney. Never had he been branded a "mobster". The defamation simply did not deal with his prior "public" conduct as a private individual.

(d) The award-winning, crime-reporting author of this article had *no* knowledge of the prior involvement of McLaney in any newsworthy event prior to working on this article. He only vaguely recalled that McLaney had a brother. This was the extent of his knowledge prior to undertaking the article involved here. Under no stretch of the imagination was McLaney a public figure because of prior public eminence. Sporadic press coverage of various incidents in which he had been involved—none of which in any way suggested that he was a mobster or criminal character, but were related in the main to matters totally unconnected with this one—could so qualify him.

Indeed, we would venture to say that the general public—with the exception of persons he had normally become

involved with as an active social figure and vigorous business man—had no idea who Michael J. McLaney was until this article was printed—any more than Lambert (the crime reporter) did.

Certainly McLaney was not, and by no stretch of the imagination could be equated with, for example, Wallace Butts, the athletic director at the University of Georgia and former head coach, who at the time he was libelled was a "well-known and respected figure in coaching ranks" and may have "attained the status" of a "public figure" by "position alone"; and had a "substantial amount of independent public interest" (as did General Walker also) at the time of the publication; CURTIS PUBLISHING CO. v. BUTTS, supra, 87 S. Ct. at 1981, 1991. Nor had McLaney spoken out on the Bahamian election or become so publicly involved in it through the mass media as to become a subject of "continuing" public interest involved in a matter of public interest—as General Walker had done on the subject-matter of his suit long prior to the alleged libel upon him. Indeed, Walker allegedly had become a man of "political prominence" (87 S. Ct. 1984) through wide publicity given to his public statements on the very subject-matter of the article. Nor was the libel on McLaney even vaguely concerned with one of the major public issues of our time—as was the subject-matter of the Walker article. (See CURTIS PUBLISHING CO. v. BUTTS, supra, 87 S. Ct. at 1984, 1991).

McLaney was virtually unknown. He was simply a private citizen and commanded no independent public interest when this libel was promulgated. He had no function in the molding of our political policy which was of important interest to the public, and certainly "by reason of (his) fame" was not in a position "to shape events in areas of concern to society at large" (BUTTS, supra, concurring opinion of Warren, C. J., 87 S. Ct. at 1996).

(e) Even in cases involving "public officials" for the privilege to apply on the basis of position, it would appear that the "position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy", ROSENBLATT v. BAER, 383 U.S. 75, 86 (footnote 13); 86 S. Ct. 669, 676 (footnote 13). Under no circumstances was McLaney in such a position of public eminence prior to this article, as an "official" or "figure".

(f) But even if his involvement in a matter of legitimate and important public concern alone *might* bring the BUTTS doctrine into play, and even if the doctrine would be applicable to one who "thrusts" himself into the "vortex" of the matter, still the doctrine is not here applicable, as it was to General Walker, who by so "thrusting" had long since become a public figure. Nor was he truly involved in an important public event—*apart from the subject-matter of the libel itself.*

In short, the defendant may not, in circular fashion, reason that organized crime and organized gambling and its movement to the Bahamas is a matter of great public importance; and then state in a libelous article that the plaintiff is involved in this important public issue and is the mob's representative with the opposition candidate; and that therefore he is involved in a matter of great public concern. Contributions alone by McLaney did not make him a public figure nor involve a great public issue, and certainly did not justify branding him a "mobster" to suit the context of the Life article.

The doctrine of *Butts*, supra; *Sullivan*, supra, and kindred cases requires reversal.

CONCLUSION

The petition for a Writ of Certiorari should be granted, and the judgment of the Fifth Circuit reversed, and the cause ultimately be remanded to the trial court for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Frates, Fay, Floyd and Pearson, Twelfth Floor, Concord Building, Miami, Florida 33130, Attorneys for Respondent, and Harold R. Medina, Jr., Esquire, Cravath, Swaine and Moore, One Chase Manhattan Plaza, New York, New York 10005, Attorneys for Respondent, this_____day of _____, 1969.

By_____
J. B. SPENCE

APPENDIX

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25585

TIME, INC., d/b/a "LIFE",

Appellant,

versus

MICHAEL J. McLANEY, a/k/a MIKE McLANEY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(January 3, 1969)

Before BROWN, Chief Judge, TUTTLE, Circuit Judge and FISHER, District Judge.

TUTTLE, Circuit Judge: We are here presented with an unusual appeal, since it has heretofore hardly ever fallen to the lot of this court to consider an appeal from the *denial* by the trial court of a motion for summary judgment. Prior to the adoption by the Congress of the 1958 Amendment to 28 U.S.C.A. §1292, by adding Section (b), no appeal could be taken from such an order by the trial court because it was not a "final order."

Now, however, this court has jurisdiction to entertain such an appeal when the provisions of Section (b) are complied with.[1]

Here the trial court made the required certificate and this court, on December 7, 1967, entered its order granting the application provided for under Section 1292 (b).

At the outset, it may be appropriate to sound a caveat with respect to the action taken by this court in granting the application for interlocutory appeal, lest every unsuccessful litigant in the trial court should consider this action as a precedent requiring or even suggesting the advisability of seeking such an interlocutory appeal upon the *denial* by the court of his motion for summary judgment. The subject matter of this litigation, involving as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski v. Pfister*, 380 U.S. 479, because of the chilling effect of such litigation.

[1] 28 U.S.C.A. §1292(b): "When a district judge, in making in a civil action an order not otherwise appealable under this Section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the court of appeals, or a judge thereof, shall so order.

In this suit, in which the plaintiff demands a recovery of one million dollars actual and five million dollars punitive damages, and in which the plaintiff established a substantial record by taking depositions from several alleged sources of information relied upon by the publisher of the offending article, this court concluded that it would be appropriate to grant the request for an interlocutory appeal. This is appropriate because the Supreme Court has heretofore resolved, at the appellate level, in a number of cases, the question whether facts alleged and proved in the trial court met the standard laid down by it as to what nature of public official or public action would withdraw from a complaining party protection of the libel laws of the states absent a showing of "actual malice," and has also decided as a matter of law whether proof actually made upon the trial met that standard. See *New York Times Co. v. Sullivan*, 376 U.S. 254, *Associated Press v. Walker*, 388 U.S. 130 (considered by the Supreme Court in connection with the cited case of *Curtis Publishing Co. v. Butts*, 388 U.S. 130, and *St. Amant v. Thompson*, 390 U.S. 727.[2]

We conclude, therefore, that there are before us two questions for consideration: (1) Do the constitutional guarantees of the First and Fourteenth Amendments deny recovery to the plaintiff in this case unless he can show that the appellant published statements about him with "actual malice"? (2) If so, does the record established by the plaintiff demonstrate that there is no issue of fact from which the jury could find "actual malice"?

[2]In the St. Amant case the trial court set aside that part of the jury verdict based on a claim for punitive damages, on the ground that punitive damages could be awarded only where "malice" had been proved. Thus the trial court excluded the issue of malice, based on the proof introduced to the jury.

In order to understand the basis for the plaintiff's claim of injury at the hands of the appellant, it is necessary to relate briefly the facts surrounding the publication of the article. We avoid repeating part of the factual recitation by dealing with the above two questions in reverse order.

The issue of Life Magazine for February 3, 1967, contained a fifteen-page article entitled "The Scandal in the Bahamas." The article was written by William Lambert and Richard Oulahan, but so far as this record is concerned the responsibility for its preparation falls on Lambert. The record discloses that Lambert was an associate editor of Life and a winner of the Pulitzer Prize for investigative reporting. He had started work on the article in the early fall of 1966. In connection with its preparation he called on the press officer of the Department of Justice, who referred him to a lawyer, Robert Peloquin, a member of the Organized Crime and Racketeering Section of the Department of Justice. During the course of this discussion, Peloquin told Lambert that gamblers who had formerly operated in Havana under the Batista regime had moved to the Bahamas. Included in the names mentioned by Peloquin was that of Mike McLaney. Peloquin stated that McLaney was "one of the Havana gamblers who had moved into the Bahamas at one time or another, and he was mentioned as having operated a casino at Cat Cay, and that was his [sic] — it was brushed over. It was relatively unimportant." Lambert made no notes of this conversation, and in the original writing of the article he made no mention of McLaney. However, he devoted a good deal of the article to discussing the influx of U.S. gangsters, paying particular attention to the activities of three men, Courtney, Ritter and Brudner, who were de-

scribed as "three Lansky henchmen." Immediately preceding the paragraph that mentions the plaintiff the single time, is this language:

> "Courtney, Ritter and Brudner are all fugitives from the United States justice under indictment for violating the federal anti-racketeering statute as well as gambling tax evasion and failure to buy the annual $50 gambling stamp (they once operated the nation's largest bookie network, inherited from the late Frank Erickson)."

Then there follows the paragraph which is the subject matter of the lawsuit:

> "Whatever the Pindling government decides to do about these three gamblers, one of their colleagues has turned up in the midst of Pindling's party. He is Mike McLaney, who managed one of Havana's big casinoes in the days when Lansky was a top mobster in the Cuban capital. During the recent election campaign, McLaney showed up in the Out Islands, providing free airlifts for PLP candidates. The mob always tried to hedge its bets."

The thrust of the article was that with connivance of the officials, the Bahamian government was actually a puppet government controlled by the United Bahamian Party (UBP). It described Sir Stafford Sands as the principal power in UBP. It developed the thesis that Sands arranged for the development of Grand Bahama Island through the Grand Bahama Port Authority, Ltd., headed by Wallace Groves. According to the article gambling was introduced to boost tourism, and Lansky and his "mobsters" arrived with the acquiescence of Sands, Groves and the UBP.

The article then described the current election that ended January 10, 1967, by the election of Lynden Pindling, head of the predominantly Negro Progressive Liberal Party (PLP), as premier of the Bahamas and the rejection of Sands and the UBP. The article commented on the fact that in his campaign Pindling had made the presence of the gambling mob, notably Lansky's lieutenants, Courtney, Ritter and Brudner, his basis for attacking the existing government and its allies. The Life article described the Pindling campaign as an effort to rid the Bahamas of the Havana gambling group.

Lamberts' article was practically completed at the time of the election on January 10th, at which time, either a day or two before the election, or a day or two following it, (the two participants to the conversation disagree as to the time) a public relations man named McCrary, from whom Lambert had obtained some earlier reports about conditions in the Bahamas, called, according to Lambert's deposition, or was called and responded, with the information that McLaney had lent helicopters to Out Island candidates (Lambert's testimony identified these as candidates for the PLP party). McCrary also testified that in a telephone conversation, a man named Joe Abrell, told him that a man named Probinski had introduced the new Prime Minister Pindling to McLaney. In his testimony McCrary emphasized: "All of this [was] hearsay and during this period it was my purpose to run down rumors." He also testified that he reported to Lambert that he had heard a rumored story around town that McLaney had introduced Lansky to Groves and another that McLaney introduced Lansky to Sands.[3]

[3]Since it is clear that the paragraph relating to McLaney originated entirely with McCrary's statement that McLaney was lending

Lambert testified that upon receiving the report from McCrary that McLaney was assisting in the Pindling campaign, he recalled having previously heard McLaney's name as a Havana gambling operator and he searched the Life Morgue and checked information to ascertain whether this would disclose any connection between McLaney and other gamblers. Having found several articles that ident-

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helicopters to assist in the Pindling campaign, the entire passage from his deposition relating to a possible connection between Lansky and McLaney is as follows:

"Q. Did you tell Mr. Lambert that Mr. McLaney introduced Lansky and Groves?

A. It was the story around. A story was spread around that presumably Sands and Bidwell (phonetically)—that Bidwell was Sands' man. A public relations guy for the Sands' party, whatever it was, U.B.P., or whatever it was. Among the stories was the fact that Mr. McLaney was working, and I was working for Chesler, going to bring Chesler back into power. That story was printed in the Miami Herald.

Q. Is it your testimony that a story appeared in the Miami Herald linking your name, Mr. McLaney's name and Chesler?

A. Yes, that is why I was in the campaign.

Q. Did you see the article yourself?

A. Yes, I was there. I got the clipping. The other story was that I had brought—you see, Lansky was even linked in everybody's mind with Courtney, Ritter and Bidwell—and that I had brought Lansky to Groves. In the course of conversation with Mr. Lambert, the Groves name came in. Whether or not it was—wait a minute, you asked a specific question. Did I say that Mr. McLaney brought Mr. Lansky to Groves, or Sands?

Q. I said Groves.

A. I did not. I said that there was a story but the other story that I heard was that Mr. McLaney had come in with Lansky to see Sands long before Groves took up gambling.

Q. Mr. McCrary—

A. And Lansky had come in to see Sands. That is the story.

Q. It is your testimony that you heard a rumored story around town that Mr. McLaney was the one that introduced Lansky and Groves?

A. That was one story. The other was that Mr. McLaney introduced Lansky to Sands. Steve Barber confirmed Lansky came in with Sands too. Along with the whole Havana crowd.

Q. Did you report this to Mr. Lambert that this was something you heard rather than your own words?

A. Definitely. I would have no knowledge."

ified McLaney as being active in Havana gambling at the time Lansky was described as practically the partner of Batista in controlling gambling, he thereupon undertook to check with the Department of Justice again. He telephoned Mr. Peloquin and found that he was away from his office on naval training. He got the call through to him at a distant point where he asked him, "McLaney has come into this election campaign. I remember you mentioned his name. What can you tell me about him?" He testified that Peloquin said: "Well, it is coming off the top of my head, because I have no notes or information here with me." Peloquin then told him about McLaney being the manager for the Cat Cay Casino that belonged to an estate. Lambert testified that Peloquin gave him other information about his age, and his notes showed that he was a golf "pro" and then his notes showed "lightweight." In his testimony Lambert reconstructed this as Peloquin's having said, "He is a professional golfer, and that he was a golf hustler," and that he said, "He makes his living by his wits and he is a gambler," adding that "he is a lightweight." In his testimony, subsequently taken, Peloquin did not remember making any comments about McLaney's being a professional golfer or a golf hustler. However, he did testify twice that the notes, copies of which had been sent to him prior to his deposition, "are relatively accurate as to the information I had as to McLaney."

Lambert stated that Peloquin then suggested that he discuss the matter with United States Attorney Morganthau and Executive Assistant Gaynor, in the Southern District of New York.

Thereupon Lambert called Mr. Morganthau, who, aside from stating that he knew of McLaney in connection with the Carrousel Casino in Las Vegas, was unable to do more than suggest that he call Mr. Gaynor.

Although Lambert's notes indicated that he obtained some additional information from Gaynor, including, for the first time, mention of an association between McLaney and Carroll Rosenblum, the only undisputed testimony, since Gaynor did not recall these facts, is Gaynor's answer, "What I testify to, and my best recollection is that he asked me about the Nacional in Havana, and I replied to him that I had read things about that, and that could be checked very easily by newspaper morgue clippings and things of that sort."

Lambert testified that during the course of these inquiries he had read the morgue references to McLaney and the Nacional.[4]

Life's folder also included numerous articles which discussed Lansky's dominant position in control of gambling in Havana during this corresponding period of time.[5]

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[4]In the morgue were the following: A New York Times story which described McLaney as "The owner of a casino at the Nacional Hotel in Havana"; another article from the New York Times in which he was called "a former Havana casino owner"; a further story in the folder from the Times in which McLaney was described as the "operator of the casino of the Nacional Hotel." These three articles appeared between March 14 and March 24, 1959. There was also a May 4, 1963 clipping from the Washington Post, written by a well known columnist, in which McLaney was referred to as "an American gambler who ran a casino in Havana and stayed on for 18 months after Castro's takeover."

[5]Lambert commented particularly on statements from the morgue file, including the following:

Thus the record appears to be undisputed that at the time the paragraph dealing with McLaney was written, substantial investigation had been made into the question whether McLaney was a professional gambler who had operated in Havana, Cuba, at a time when numerous press reports agreed that such an operation in the Cuban capital could be carried on only with the agreement or protection of Lansky.

Thereupon, Lambert sought to check out McCrary's statement to him that McLaney had helped in the Pindling election. This he did by calling the new Prime Minister direct. The latter confirmed the fact that McLaney had

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"No American gambler, gangster or racketeer now can work in Havana without Lansky's OK." (N.Y. World-Telegram, Jan. 9, 1958; R. 69, 263).

"Government supervision goes for all the games as they are being run under the partnership that racketeer Lansky has negotiated with Batista. Regular police are assigned to 24-hour duty at all the big gaming casinos and secret police frequently mingle with the guests.

. . . .

But any number of other gamblers and bookmakers are around, including Frank Ritter and Max Courtney, who have long records, operating without interference from anyone. Courtney and Ritter, working with a New York attorney, have made several bids to get a piece of gambling at the Havana Hilton.

The Cuban government shows no sign of being aware of, much less disturbed by, the presence of the American mobsters on the Havana scene. And the prospect is that so long as Meyer Lansky, who is becoming the most feared racketeer in the U.S., remains a virtual partner of Dictator Batista in the gambling racket there will be no change.' (N.Y. Daily News, Jan. 1958; R. 72, 264-65."

". . . No one could operate unless approved by Lansky, who has been a partner of Frank Erickson, Frank Costello, and 'Dandy Phil' Kastel, and knows his gambling fraternity.' (N.Y. Journal American, Feb. 21, 1958; R. 77, 267-68).

"All concessions to operate in Cuba had to have the OK of Lansky.' (N.Y. Journal American, Feb. 21, 1958; R. 78, 268.)"

". . . None of the mob would make a move without talking it over with Miami's Meyer Lansky, 57, gangland boss of the southeastern U.S. and board chairman of the whole Havana show.' (Time, Mar. 2, 1959; R. 86, 270-71.)"

made transportation available to the candidates in the "Out Islands," running as PLP candidates. Lambert testified that after completing this investigation he added the paragraph concerning McLaney to the article.

There is no suggestion that Lambert knew of any fact or circumstance which would cause him to doubt the truth of the statements made by him. Much is made by the appellee of the fact that, in his deposition, McCrary stressed the fact that much of what he told Lambert was hearsay — that is to say, rumors that he had heard around the Bahamas. This included the rumor, repeated by McCrary to Lambert, that McLaney was boasting in the bars of the Bahamas that he was going to take over the gambling business when the new government ousted the three Lansky henchmen.[6]

We are not here dealing with the correctness of all of the statements made in the paragraph complained of. We are concerned with the means by which Lambert obtained the basis for the statements, and, if required by the standard set down by the Supreme Court, the efforts he made to check the information. Finally, we must de-

[6]Lambert testified that this was stated to him by McCrary but that when he first heard it he gave no significance to it because it had come to him from an English newspaperman who had picked it up second hand. However, he testified that when he made his call to Prime Minister-Elect Pindling, he specifically put the question to him (presumably, he meant whether there was an agreement that McLaney was to take over the gambling under the new government) and Pindling answered, "Well, no, McLaney—we don't have any"—he said McLaney has just been helpful, and I don't know any of these things. He never did actually say—he didn't give me a flat denial about McLaney being involved. He did say that—the implication was that he had made no such arrangements and he didn't deny it.

"I didn't press it. I didn't think it was material." No statement to this effect was used in the article.

termine whether it is permissible for this court to conclude, as a matter of law, whether there was any fact put in issue on the record in the trial court which would require submission to a jury the question whether the plaintiff had carried his burden of showing not only the falsity of the statement, but, if false, that it was motivated by "actual malice," as defined by the recent Supreme Court decisions.

As we have shown, the record is undisputed that Lambert had ample justification for whatever statements were made to the effect that Meyer Lansky was head of a "mob" of gamblers in Havana; that this was with the connivance of dictator Batista, and that no one could carry on a major gambling operation in Havana without the consent of Lansky; that Ritter and Courtney and Brudner were operating openly in Havana at this time. It is equally clear that there was ample information available to Lambert to warrant his statement that McLaney was, at a time during and after the Batista regime, either the owner or operator of the casino at the Hotel Nacional. We attach no significance to the use of the word "ran," which Lambert explains was a compromise between what he had found in the newspaper clippings saying in the one place that McLaney was "owner" and in another that he was "operator."

Moreover, Lambert testified that in an injuiry made to the Department of Justice lawyer Peloquin in the early fall of 1966, the latter told him that this organized gamblers group had moved from Havana to the Bahamas, and he named McLaney as one of these gamblers.[7]

[7]In appellee's brief here, this personal conversation with Peloquin, is ignored. It is implied, rather, that the sole source of Lambert's information from Peloquin was the telephone call made to him in

Also, appellee emphasizes the differences between Lambert's testimony and McCrary's recollection of what was said on the occasion of McCrary's informing Lambert of McLaney's assistance given to the Pindling party in the election. These differences are irrelevant to the consideration before us now. All the information furnished by McCrary relevant to the present inquiry was the basic fact that McLaney had injected himself into the election of the new government, which was committed to put an end to the control of the gambling fraternity over governmental affairs in the Bahamas at a time when the records disclosed, without reference to whatever McCrary may have said, McLaney himself was a gambler, both as an individual and as an operator, and who had been operating a substantial gambling establishment in Cuba at a time when, according to reliable newspaper reports, such activity required such a person to be in league, directly or indirectly, with the overlord of all gambling, Meyer Lansky.

Drawing a conclusion therefrom that such a person was a "colleague" of the other three Havana gamblers, clearly identified as Lansky henchmen, required no further checking or verification, since "colleague" is merely a conclusionary word drawn from the basic facts which had been subjected to investigation.

January of 1967, after having learned from McCrary of McLaney's activity in the election campaign. Appellant's counsel, in cross-examining Lambert as to his telephone conversation with Peloquin, sought to show that Peloquin did not discuss the removal of the gambling mob to the Bahamas nor that the word "mob" was ever used or that Lambert asked him whether or not McLaney was a Lansky associate. The point of the matter is this does not create any dispute of fact between Lambert's testimony and that of Peloquin, because Lambert's testimony about Peloquin having told of McLaney being a gambler in Havana and having moved to the Bahamas related to a conversation with Peloquin several months earlier, as to which no inquiry was made of him when his deposition was taken.

As we have previously stated, courts, federal courts in particular, are reluctant to deprive a litigant of the opportunity to present his case to a jury. Particularly, under the Federal Constitution, are the courts denied the right to do so if there be a disputed issue of fact, which, if found in favor of the losing party, would entitle him to have a verdict by the jury sustained. Where, however, it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper.

What, then, is the standard against which the facts of this case must be tested? The basic rule, denying full protection of the state libel laws because limited by the First Amendment, was set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254. This court in *New York Times Co. v. Connor*, (5th Cir., 1966) 365 F.2d 267, discussed the Sullivan Rule:

> "This case is admittedly governed by the legal standards enunciated in the recent Supreme Court case of New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686, since Connor is clearly a public official. As such, he is prohibited 'from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard

of whether it was false or not.' Id. at 279, 84 S.Ct. at 726, 11 L.Ed. 2d at 706. The showing of malice may not be 'presumed but is a matter for proof by the plaintiff' * * * [S]ince the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated' * * * *we* [*must*] '*examine for ourselves the statements in issue and the circumstances under which they were made to see* * * *whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' The court concluded that '*the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands* * * *' and reversed the libel conviction. Id. at 284-286, 84 S.Ct. at 728-729, 11 L.Ed. 2d at 709-710. Additional explanation of the actual malice standard is found in Garrison v. Louisiana, 1964, 379 U.S. 64, 74-79, 85 S.Ct. 209, 216-218, 13 L.Ed. 2d 125, 132-135 in which the Court stated that: (emphasis added.)

'* * * since' * * * erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive' * * *,' only those 'false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be subject to either civil or criminal sanctions.'

* * * *

> 'The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth."

The standard was later enunciated in *Time, Inc. v. Hill*, 385 U.S. 374 and then in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, *St. Amant v. Thompson*, 390 U.S. 727, and finally in *Pickering v. Board of Education*, 391 U.S. 563.

While the principle has been stated somewhat differently by majority, concurring and dissenting opinions, we note that throughout, as stated in the opinion in St. Amant, *supra*, "There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious dobuts as to the truth of his publication.".390 U.S. 727, 731.

So, too, the Supreme Court, in the Sullivan case, determined for itself that there was no issue of malice to be submitted to the jury. Being guided by the same test, we note that in this case there is a complete absence of any indication of that the writer of the article had any suspicion of the falsity of the statements made by him, and that there is a total lack of proof that he had before him any contra-indications as to the correctness of his conclusions. Thus, we answer the second question by deciding that this record, fully developed by affidavits and depositions taken at the instance of the plaintiff, demonstrated that no proof was adduced that had "the convincing clarity which the constitutional standard demands." *New York Times Co. v. Sullivan, supra*, at 286.

We come next to the first question: "Do the established facts make applicable this standard of actual malice?"

The cases already cited make clear that the thrust at state libel laws is proper in other varying situations in which matters of great public interest are involved. In Walker and Butts, *supra*, the standard of New York Times was applied to "public figures", and in Hill, *supra*, to suits for invasion of privacy based on false statements where a "matter of public interest is involved." Furthermore, we agree with the Court of Appeals for the Ninth Circuit in which in its recent case, *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., et al* (9th Cir., No. 21,466) D.C. November 18, 1968, said: "The standard of New York Times was not to be regarded as having had 'its outer limits . . . marked out' so as not to be open to further definition.

We conclude that the constitutional privilege extends to discussions by specific individuals, not associated with any government, if those individuals are involved in matters of important public concern. Such was the case of the plaintiff here. He had injected himself into an election campaign in a small foreign country in which the announced policy of the opposition to the present government was the elimination of racketeer gambling. He had supported the effort of this reform government by contributing substantial material aid,[8] and thus lent a direct influence to the election of a national government for the country. Such activities as he engaged in, and his con-

[8]Varying values are stated by different persons as to the cost of the helicopter rentals incurred by McLaney. The amounts varied from $25,000 to $100,000. The figure of approximately $60,000 seems well established.

duct as such a participant, are the proper subject of inquiry and of public interest. It seems clear, that he, as much as General Walker in the Walker case, supra, acted in a manner that amounted to a "thrusting of his personality into the 'vortex' of an important public controversy."

We conclude, therefore, that the defendant was entitled to a summary judgment because, following a motion for such judgment, and after proof was taken to show, if possible, the existence of malice, the record is silent as to any facts which would permit a fact finder to conclude that the standard laid down by the Supreme Court had been met by the plaintiff.

The judgment denying motion for summary judgment is REVERSED and the case is REMANDED to the district court with directions that a summary judgment for the defendant be entered.

APPENDIX B

ORDER.

Filed Nov. 1, 1967.

(TITLE OMITTED)

Defendant having moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment, dismissing the complaint herein, counsel having been heard, and due deliberation having been had, it is

Ordered that Defendant's motion for summary judgment dismissing the complaint is denied upon the ground that it does not appear that the Plaintiff is a public figure and involved in an issue in which the public has a justified and important interest.

The Court being of the opinion that this Order involves controlling questions of law as to which there is substantial ground for difference of opinion namely:

(1) Is the Plaintiff a public figure involved in an issue in which the public has a justified and important interest so as to place upon the Plaintiff the burden of showing reckless disregard of the truth or falsity of the complained-of-reference, or the burden of showing highly unreasonable conduct in reference to the truth of the statement that Plaintiff was closely associated with mob activities; and

(2) If the foregoing question is answered in the affirmative, is there an issue of fact to submit to a jury with respect to the Defendant's reckless disregard of the

truth or falsity of its publication, or as to whether the conduct of the Defendant was highly unreasonable, constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

And the Court being of the further opinion that an immediate appeal from this Order may materially advance the ultimate termination of the litigation, it is

Further Ordered, pursuant to 28 U.S.C. 1292(b), that all proceedings herein are stayed for a period of not less than ten days from the date of this Order to allow Defendant time to apply for permission to appeal from this Order, such stay to continue in effect until final disposition of such application and any appeal which may result therefrom.

Done and Ordered in Chambers at Miami, Florida, this 31st day of October, 1967.

EMETT C. CHOATE,
Senior United States District
Judge.

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1968

No. 25585

D. C. Docket No. 67-398-Civil-EC

TIME, INC., d/b/a "LIFE",

Appellant,

versus

MICHAEL J. McLANEY, a/k/a MIKE McLANEY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, TUTTLE, Circuit Judge, and FISHER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court with directions that a summary judgment for the defendant be entered, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Michael J. McLaney, a/k/a Mike McLaney, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 3, 1969

Issued as Mandate: Feb. 20, 1969

APPENDIX D

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 25585

TIME, INC., d/b/a "LIFE,"

Appellant,

versus

MICHAEL J. McLANEY, a/k/a MIKE McLANEY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING EN BANC

(February 11, 1969)

Before BROWN, Chief Judge, TUTTLE, Circuit Judge, and FISHER, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

SUPREME COURT U. S.

FILED
MAY 9 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1266

MICHAEL J. McLANEY, a/k/a
MIKE McLANEY,

Petitioner,

vs.

TIME, INC., d/b/a "LIFE",

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

PAGE

OPINION BELOW 1

QUESTIONS PRESENTED 2

STATEMENT 2

ARGUMENT

(a) THE CONSTITUTION BARS THIS PETITION 2

(b) PUBLIC INTEREST 4

CONCLUSION 7

TABLE OF AUTHORITIES

CASES:

Beckley Newspapers Corp. v. *Hanks*, 389 U. S. 81 . 3

Curtis Publishing Co. v. *Butts*, 388 U. S. 130 3

Dombrowski v. *Pfister*, 380 U. S. 479 3

Garrison v. *Louisiana*, 379 U. S. 64 3

Grosjean v. *American Press Co.*, 297 U. S. 233 3

Henry v. *Collins*, 380 U. S. 356 3

Linn v. *Plant Guard Workers*, 383 U. S. 53 3

N. A. A. C. P. v. *Button*, 371 U. S. 415 3

New York Times Co. v. *Sullivan*, 376 U. S. 254 ..3, 4, 6

Rosenblatt v. *Baer*, 383 U. S. 75 3

St. Amant v. *Thompson*, 390 U. S. 727 3

Smith v. *California*, 361 U. S. 147 3

Thornhill v. *Alabama*, 310 U. S. 88 3

Time, Inc. v. *Hill*, 385 U. S. 374 3

Time, Inc. v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969) 1, 3, 6

PAGE

United Medical Laboratories, Inc. v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* U. S. (March 24, 1969) 1, 3, 4

Washington Post Co. v. *Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011 .... 1, 2, 4

UNITED STATES CONSTITUTION:

Amendment I 2, 4, 7

Amendment XIV § 1 7

OTHER AUTHORITIES:

COMMISSION OF INQUIRY INTO THE OPERATIONS OF THE BUSINESS OF CASINOS IN FREEPORT AND IN NASSAU, REPORT (1967) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

MICHAEL J. McLANEY, a/k/a
MIKE McLANEY,

Petitioner,

vs.

TIME, INC., d/b/a "LIFE",

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

Petitioner seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit which on January 3, 1969, granted summary judgment to respondent. The action is in libel based upon an article published in Life Magazine. The opinion below is reported at 406 F. 2d 565. It contains a complete and detailed statement of the relevant facts of this case and the basis for granting of summary judgment. Initially, this Court can read that opinion and, as it did in *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* U. S. (March 24, 1969) and *Washington Post Co.* v. *Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011, and upon the same grounds, deny certiorari.

QUESTIONS PRESENTED

Three questions have been presented concerning recent First Amendment cases dealing with constitutional protection in connection with defamation. First, when does the mantle of constitutional protection fall? Secondly, if it does offer protection, precisely what is that protection? Thirdly, by what means can the publisher avail himself of that protection?

STATEMENT

McLaney, a professional gambler who operated the Casino Nacional in Havana at a time when the notorious Meyer Lansky in cooperation with Batista controlled gambling there and, thereafter, gambling casinos at Cat Cay in the Bahamas and the Carrousel in Las Vegas, objects to a comment concerning him written in connection with his contribution of $60,000 towards election of Lynden Pindling as Premier of the Bahamas at a time when gambling in the Bahamas was the prime election issue. Basis for Life's statement is set forth *in extenso* in the opinion of the Fifth Circuit below and need not be repeated here. Suffice it to say that respondent's employees, file and sources were examined in detail and revealed conclusively that the statement concerning petitioner in respondent's magazine Life was made in good faith and upon a firm basis concerning a matter of public interest.

ARGUMENT

(a) The Constitution bars this petition.

If this petition had been filed five years ago there would have been ample justification for this Court to grant the petition and review the case. We submit, however, that all three questions have now been substantially determined, certainly determined in so far as they apply to this action.

There therefore is nothing to review today as this Court's decisions* have so clearly established.

It should now be apparent that constitutional protection is granted in defamation to discussion of matters of public interest. That was the explicit *basis* for this Court's holdings, when dealing with defamation, in *New York Times* (p. 269), *Garrison* (pp. 74-75), *Rosenblatt* (p. 86), and *Butts* (pp. 150-52). It was the *holding* of this Court in *Hill* (pp. 387-88) dealing with privacy and in which the question of the public interest test to defamation, as a direct holding, was reserved (p. 397). The Ninth Circuit in *United Medical* explicitly took the step reserved by this Court in *Hill* and made public interest the test for defamation. This Court denied certiorari in that case (U. S. March 24, 1969). The Fifth Circuit in this action explicitly adopted the rationale of *United Medical* (p. 573).

Moreover, the nature of the constitutional protection has now been thoroughly explored. This Court made quite clear that the test was actual knowledge of falsity or recklessness in *New York Times*. It went on further to define recklessness in *Garrison*, "high degree of awareness of probable falsity" (p. 74) and in *St. Amant*, "serious doubts as to truth" (p. 731). That avenue is now concluded.

Lastly, this Court has made it quite clear that summary judgment, rather than trial on the merits, is the proper vehicle for affording constitutional protection in the proper case. It had noted in *New York Times* (p. 279) and *Hill* (p. 389) that fear of the expense of trial was a valid one.

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*Those cases include doctrines announced in, among others: *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Thornhill* v. *Alabama*, 310 U. S. 88; *Smith* v. *California*, 361 U. S. 147; *N.A.A.C.P.* v. *Button*, 371 U. S. 415; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Garrison* v. *Louisiana*, 379 U. S. 64; *Henry* v. *Collins*, 380 U. S. 356; *Dombrowski* v. *Pfister*, 380 U. S. 479; *Linn* v. *Plant Guard Workers*, 383 U. S. 53; *Rosenblatt* v. *Baer*, 383 U. S. 75; *Time, Inc.* v. *Hill*, 385 U. S. 374; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81; *St. Amant* v. *Thompson*, 390 U. S. 727.

Thereafter, in *Keogh* and *United Medical,* this Court denied certiorari and thus upheld the granting of motions for summary judgment in First Amendment cases. That, it seems to us, should end the matter.

This case qualifies on all three counts. (1) It has public interest in an article dealing with the activities of the gambling mob who financed their activities in the United States by operation of gambling in the Bahamas, as well as dealing with an election in the Bahamas in which petitioner McLaney actively participated. Certainly, there is deep public interest in both (compare the public interest in Castro of Cuba in the latter regard). (2) The lack of "knowledge of falsity" or "serious doubts as to truth" has been so conclusively demonstrated that the point is not even raised in the petition for certiorari. (3) Finally, the full disclosure of respondent's activities and sources, sufficient for the granting of summary judgment, has been demonstrated to the Court, as conclusively shown by the detailed statement of fact contained in the Fifth Circuit's opinion below.

The course of *New York Times* has run and, absent some unusual case or refusal of lower courts to follow these new concepts, there should be nothing more for this Court to review. If we are wrong in that conclusion, based upon the reasons we have stated, we would welcome review in order to ensure that we are correct in our statement of those principles.

(b) Public interest.

We need not deal with the question of "actual malice" since lack of that element in his case has been conceded by petitioner's failure to deal with it in his petition. We need deal no further with the perquisites of a motion for summary judgment based thereon, since the Fifth Circuit's opinion has dealt with that subject extensively and conclusively. There remains the subject of "public interest" as to which a short additional statement may be helpful to the Court.

McLaney was admittedly involved in the Bahamas election. According to his own admission he participated in the Pindling election campaign. Additionally, he was involved in Havana gambling when it was widely known to have been controlled by American organized crime and there was a direct connection between the former Havana gambling fraternity and the kingpins of the gambling structure in the Bahamas. McLaney's connection with doings in the Bahamas was of immediate public importance. Thus it was both in context and timely to point out in the Life article that a colleague of "Courtney, Ritter and Brudner" had turned up in the political campaign of the anti-mob candidate. The article dealt with precisely that matter of public interest, not with petitioner's private life, and in that context petitioner, not Life, made his activities a matter of legitimate public interest.

There was sufficient public interest so that, following the Life article, a Royal Commission of Inquiry was appointed in the Bahamas. At hearings held in the spring of 1967, the Commission was especially interested in petitioner's background and in his scheme to take over Bahamian gambling. Petitioner testified before the Commission. In its Report, the Commission of Inquiry confirmed that American organized crime had infiltrated gambling in the Bahamas. The Commission devoted a separate section of its Report to petitioner's attempt to take over gambling under Pindling, and concluded:

> ". . . On the evidence of his past activities, which we heard in detail from the Commissioner of Police, we formed the opinion that Mr. McLaney was an unscrupulous individual. . . . We regard Mr. McLaney as a thoroughly dangerous person who is likely to do nothing but harm to the Bahamas." COMMISSION OF INQUIRY INTO THE OPERATION OF THE BUSINESS OF CASINOS IN FREEPORT AND IN NASSAU, REPORT 94-95 (1967).

Petitioner's argument that he is not a public figure is, in reality, grounded upon his conclusion that he has not been publicly identified as a colleague of Courtney, Ritter and Brudner before, and therefore is not a public figure in that context. This argument assumes that there must be at least one prior public identification of the individual in the specific context of the discussion of the matter of public interest before the constitutional protections will be available as to statements made concerning that individual. In other words, there is no constitutional protection for a first publication; the first publisher must publish at the risk of being able later to prove his statements by court room evidence. This type of fallacious argument proposes a rule of law which would be just as inhibitory on free speech as the pre-*New York Times* decisions. Certainly the asserted lack of prior public identification is not relevant. Some types of individuals, such as leaders in organized crime shun publicity, yet this vocational quirk cannot enable them to avoid the extra protection afforded to the press for reports on the important subject of organized crime where these individuals have a legitimate connection and are mentioned. Constitutional protections cannot be destroyed by such self-serving behavior.

Our legal conclusion, then, is the principle that constitutional protection is given to discussion of matters of public interest and a person connected with such a matter (whether or not he received prior publicity) is a "public figure" for purposes of that constitutional protection. Conversely, a person who has received prior publicity and thus become a "public figure" is himself a matter of public concern justifying constitutional protection to discussion concerning him.*

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*Petitioner qualifies on either theory as is evidenced by the extensive publicity concerning, among other things, his operation of the Casino Nacional, as pointed out in the opinion below, 406 F. 2d at p. 569.

The issue here is not whether the statements about petitioner are true. Respondent believes that they are true and, if necessary, it can prove that they are true. The issue is whether, consistently with the freedom of press guaranteed by the First and Fourteenth Amendments, petitioner by bringing this action can force respondent to spend hundreds of thousands of dollars to prove at a trial that the statements are true when the record on the motion for summary judgment shows that he cannot establish that respondent published the statements with "actual malice". If the publishing industry faces this prospect every time it prints an article on organized crime, then the mob has found an easy way to silence the press.

CONCLUSION

The petition does not present any questions warranting review by the Court and should be denied.

May 8, 1969

Respectfully submitted,

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